

**ST 12-19**

**Tax Type: Sales Tax**

**Tax Issue: Bad Debt Write-Off**

**STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS**

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<b>ABC BANK,</b>	)	Docket No.	XXXX
	)	Claim Periods	1/08 — 12/09
v.	)		
<b>THE DEPARTMENT OF REVENUE</b>	)	John E. White,	
<b>OF THE STATE OF ILLINOIS,</b>	)	Administrative Law Judge	

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Peter Larsen, Akerman Senterfitt, and Fred Marcus, Horwood Marcus & Berk, Chartered, appeared for ABC BANK; John Alshuler, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

**Synopsis:**

The matter involves the Illinois Department of Revenue's (Department) denial of amended returns that ABC BANK (ABC BANK) filed to claim a refund of retailers' occupation tax (ROT) that was related to bad debts that ABC BANK wrote off on its federal income tax returns during January 2008 through December 2009.

In lieu of hearing, the parties submitted a Stipulation of Facts (Stip.) and exhibits. The issue is whether ABC BANK is entitled to a refund of tax that is equal to a portion of the ROT remitted to the Department by retailers from whom certain of ABC BANK's credit account customers made retail purchases of tangible personal property, and which accounts were later written off by ABC BANK as bad debts. I am including in this recommendation findings of fact and conclusions of law. I recommend the denial be finalized as issued.

**Stipulations and Findings of Fact:**

1. ABC BANK provided sales financing programs to numerous retailers (Retailers) in the State of Illinois. Stip. ¶ 2.
2. As part of their normal business, the Retailers offered their customers the option of financing their purchases, including the amount of Illinois tax due on such purchases, on a credit basis. Stip. ¶ 2.
3. ABC BANK entered into agreements (Agreements) with Illinois Retailers which provided that ABC BANK would originate or acquire consumer charge accounts and receivables from such Retailers on a non-recourse basis. Stip. ¶ 2. Under those Agreements, ABC BANK acquired any or all applicable contractual rights relating thereto, including the right to any and all payments from the customers and the right to claim Retailer's Occupation Tax (ROT) refunds or credits. *See id.*
4. Under the Agreements, when a customer financed a purchase using the consumer's account, ABC BANK remitted to the Retailer the amount that the customer financed. Stip. ¶ 3. This included some or all of the purchase price, depending on whether the customer financed the entire purchase or only a portion of the purchase, and the amount of the tax that the purchaser owed based on the selling price of the property purchased. *See id.* The Retailers then remitted the complementary amount of ROT they owed to the State for each transaction. *See id.*
5. Some of the customers subsequently defaulted on their accounts (Accounts), and it is these defaulted Accounts that are the subject of ABC BANK's claim in this case. Stip. ¶ 4. When the customers defaulted on the Accounts, they did not repay the full amount of the purchase price and the ROT, and a portion of such amounts remains unpaid. *Id.*
6. After reasonable attempts to collect the balances that remained on the defaulted Accounts, ABC BANK determined that they were worthless. Stip. ¶ 5. That is, all of the surrounding circumstances indicated that the debts were uncollectible and that legal action to enforce payment would not result in the satisfaction of execution on a judgment. *Id.* ABC BANK then wrote the remaining balances off as worthless on its

books and records. *Id.* ABC BANK, and not the Retailers, bore the economic loss on these defaulted accounts. *Id.*

7. ABC BANK claimed the remaining, unpaid, balances on these Accounts as bad debts, pursuant to § 166 of the Internal Revenue Code (Code), on its United States (U.S.) corporate income tax returns. Stip. ¶ 6. These bad debts were written off over the period of January 1, 2008 to December 31, 2009, and claimed on ABC BANK's U.S. corporate income tax returns covering this period. *Id.*
8. On September 28, 2010, ABC BANK filed a claim for a refund or credit (Claim) pursuant to 86 Ill. Admin. Code § 130.1960. Stip. ¶ 7; Stip. Ex. A (copy of Claim forms and attachments). The Claim was for the period from January 1, 2008 through December 31, 2009, in the amount of \$1,600,853.32. Stip. ¶¶ 1, 7; Stip. Ex. A. That amount is the portion of Account balances that were written off as bad debts that is attributable to the ROT. Stip. ¶ 7. Of this total amount, \$640,123 is attributable to the period of January 1, 2008 through December 31, 2008, and \$960,731 is attributable to the period of January 1, 2009 through December 31, 2009. *Id.*
9. The Department denied ABC BANK's Claim on January 31, 2011 (Stip. ¶ 8; Stip. Ex. B (copy of Notice of Tentative Denial of Claim (Denial))), following which ABC BANK protested that Denial, and asked for an administrative hearing. Stip. ¶ 9; Stip. Ex. C (copy of ABC BANK's protest).
10. ABC BANK's Claim does not contain the detailed information and amounts required to be reported within the different parts of the form. *Compare* Stip. Ex. A *with* 35 ILCS 120/6a *and* ST-1-X Instructions (a .pdf copy of which is viewable at the Department's web site, <http://tax.illinois.gov/taxforms/Sales/ST-1-X-Instr-2011.pdf>) (last viewed on December 5, 2012).
11. For example, when identifying the filer's business in Step 1 of the form ST-1-X, the ST-1-X Instructions directs the filer to "Write your Illinois account ID (previously known as your Illinois business tax (IBT) number) as it appears on your original Form ST-1." Because ABC BANK did not engage in the occupation of retailing (*see* Stip. ¶ 2), it did include such an account number on its Claim forms, and instead

entered its federal employer identification number in Step 1 of each Claim form. Stip. Ex. A, pp. 1, 3.

12. The ST-1-X Instructions directs the retailer/claimant to detail, in Step 4, Column A of the form, all of the financial information that the retailer previously reported on its original ST-1 form for the period, and then, in Column B, to detail any and all corrections that it is making to the financial information it previously reported. ST-1-X Instructions, p. 2 (<http://tax.illinois.gov/taxforms/Sales/ST-1-X-Instr-2011.pdf>) (last viewed on December 5, 2012).
13. On the Claim form ABC BANK filed for the period of January 1, 2008 through December 31, 2008, in Step 4, it left blank the lines of Column A that are designated for reporting the total receipts and deductions that ABC BANK would have reported on its original ST-1 form for the same period, had it filed one. Stip. Ex. A, p. 2 (Column A, lines 1-2). It reported 0 as the amount of its most recently reported taxable receipts for the reporting period. Stip. Ex. A, p. 2 (Column A, line 3). In Column B of Step 4, ABC BANK left blank the line designated to report a correction to the amount of total receipts for 2008, and reported an additional \$8,001,535 in deductions, as a correction of the amount of deductions that would have been reported on its original ST-1 return, had it filed one. Stip. Ex. A, p. 2 (Columns A-B, lines 1-3). Based on the increase of deductions reported as a correction, ABC BANK reported an overpayment of \$640,123. *Id.*, p. 2 (Column B, line 27).
14. The tax claimed to have been overpaid by ABC BANK for 2008 is approximately 8% of the amount of the additional deductions reported (*see id.* ( $640,123/8,001,535 \approx 0.0800000249$ )), while the Illinois ROT rate was (and remains) 6.25%. 35 ILCS 120/2-10 (ROTA § titled, Rate of tax).
15. On the Claim form it filed for the period of January 1, 2009 through December 31, 2009, ABC BANK reported virtually identical entries in Column A as it had on the Claim for 2008. Stip. Ex. A, pp. 2, 4. Under Column B, ABC BANK reported having a corrected amount of additional deductions in the amount of \$12,009,132, and an overpayment of \$960,731. *Id.*, p. 4 (Column B, lines 2-3, 27). The tax claimed to have been overpaid by ABC BANK for 2009 is approximately 8% of the amount of

the additional deductions reported. *Id.* (960,731/12,009,132  $\approx$  0.0800000366); *but see* 35 ILCS 120/2-10.

### **Conclusions of Law:**

Section 6b of the ROTA provides that the Department's denial of a taxpayer's claim for credit constitutes prima facie proof that the taxpayer is not entitled to a credit. 35 ILCS 120/6b. The Department's prima facie case is a rebuttable presumption. The presumption is overcome, and the burden shifts back to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and identified with its books and records, to show that the Department's determinations are wrong. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 156-57, 242 N.E.2d 205, 206-07 (1968); A.R. Barnes & Co. v. Department of Revenue, 173 Ill. App. 3d 826, 832, 527 N.E.2d 1048, 1052 (1<sup>st</sup> Dist. 1988).

ABC BANK argues that it is entitled to a refund pursuant to ROT regulation (ROTR) § 130.1960. ABC BANKcorp Trust Bank's Opening Brief (Taxpayer's Brief), *passim*; 86 Ill. Admin. Code § 130.1960(d). The applicable ROTR provides, in pertinent part:

Section 130.1960 Finance Companies and Other Lending Agencies --  
Installment Contracts -- Bad Debts

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d) Bad Debts

1) In case a retailer repossesses any tangible personal property and subsequently resells such property to a purchaser for use or consumption, his gross receipts from such sale of the repossessed tangible personal property are subject to Retailers' Occupation Tax. He is entitled to a bad debt credit with respect to the original sale in which the default has occurred to the extent to which he has paid Retailers' Occupation Tax on a portion of the price which he does not collect, or which he is not permitted to retain because of being required to make a repayment thereof to a lending agency under a "with recourse" agreement. Retailers of tangible personal property other than motor vehicles, watercraft, trailers and aircraft that must be registered with an agency of this State may obtain this bad debt credit by taking a deduction on the returns they file with the Department for the month in which the federal income tax return or amended return on which the receivable is written off is filed, or by filing a claim for credit as provided in subsection (d)(3) of this Section. Because retailers of motor

vehicles, watercraft, trailers and aircraft do not pay Retailers' Occupation Tax to the Department on retail sales of motor vehicles, watercraft, trailers, and aircraft with monthly returns, but remit the tax to the Department on a transaction by transaction basis, they are unable to take a deduction on the returns that they file with the Department, but may file a claim for credit with the Department, as provided in subsection (d)(3), on any transaction with respect to which they desire to receive the benefit of the repossession credit.

2) Retailers who incur bad debt on any tangible personal property that is not repossessed may also obtain bad debt credit as provided in subsections (d)(1) and (3).

3) In the case of tax paid on an account receivable that becomes a bad debt, the tax paid becomes a tax paid in error, for which a claim for credit may be filed in accordance with Section 6 of the Retailers' Occupation Tax Act, on the date that the Federal income tax return or amended return on which the receivable is written off is filed.

86 Ill. Admin. Code § 130.1960 (2000); 24 Ill. Reg. 18376 (eff. December 1, 2000).

ABC BANK argues that the bad debt regulation allows a retailer to claim a refund or deduction where (1) ROT was remitted on the sale and (2) the account is written off as uncollectible for federal tax purposes. Taxpayer's Brief, p. 6. ABC BANK claims that it meets each requirement because it is undisputed that ROT was remitted to the State of Illinois on each of the sales that relate to the Accounts, and it is also undisputed that ABC BANK wrote off its bad debt Accounts on its federal income tax returns and on its books and records. *Id.*; Stip. ¶¶ 3, 5-6. The Department responds that ABC BANK is not entitled to a credit under ROTR § 130.1960(d) because it is not a retailer, and because none of the Retailers with whom ABC BANK entered into agreements would have been entitled to a refund for a bad debt deduction under the express text of ROTR § 130.1960(d). Department's Response Brief, pp. 5-8.

I agree with the Department that ROTR § 130.1960(d) does not authorize a refund to be paid to ABC BANK, given the facts of record. That conclusion is based on the plain text of ROTR § 130.1960(d), read together with the scheme the Illinois General Assembly created to provide a statutory remedy for retailers who, through a mistake of fact or law, have overpaid the amount of tax due to the State. That statutory scheme begins with § 6 of the ROTA, which provides, in pertinent part:

§ 6. Credit memorandum or refund. If it appears, after claim therefor filed with the Department, that an amount of tax or penalty or interest has been paid which was not due under this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum or refund to the person who made the erroneous payment or, if that person died or became a person under legal disability, to his or her legal representative, as such. ... Claims submitted by the retailer are subject to the same restrictions and procedures provided for in this Act. \*\*\*

\*\*\* No credit may be allowed or refund made for any amount paid by or collected from any claimant unless it appears (a) that the claimant bore the burden of such amount and has not been relieved thereof nor reimbursed therefor and has not shifted such burden directly or indirectly through inclusion of such amount in the price of the tangible personal property sold by him or her or in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he or she or his or her legal representative may be relieved of the burden of such amount, be reimbursed therefor or may shift the burden thereof; or (b) that he or she or his or her legal representative has repaid unconditionally such amount to his or her vendee (1) who bore the burden thereof and has not shifted such burden directly or indirectly, in any manner whatsoever; (2) who, if he or she has shifted such burden, has repaid unconditionally such amount to his own vendee; and (3) who is not entitled to receive any reimbursement therefor from any other source than from his or her vendor, nor to be relieved of such burden in any manner whatsoever. No credit may be allowed or refund made for any amount paid by or collected from any claimant unless it appears that the claimant has unconditionally repaid, to the purchaser, any amount collected from the purchaser and retained by the claimant with respect to the same transaction under the Use Tax Act.

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35 ILCS 120/6.

Section 6 of the ROTA “is a special remedial statute. Its general purpose is limited to those who have paid a tax pursuant to the act which, by reason of some mistake of law or fact, they should not have paid.” Peoples Store of Roseland v. McKibben, 379 Ill. 148, 152, 39 N.E.2d 995, 998 (1942). More to the point, ROTA § 6 makes clear that the reason why retailers are entitled to a refund of tax they should not have paid is because tax, or some portion of it, was not due in the first place. 35 ILCS 120/6 (“If it appears ... that an amount of tax or penalty or interest has been paid *which was not due under this Act*, whether as the result of a mistake of fact or an error of law, ....”) (emphasis added). Here, ABC BANK has wholly failed to show that any of the ROT that

the Retailers remitted to the Department was not due. *See Stip. passim*; 35 ILCS 105/3-45.<sup>1</sup>

Next, the stipulated record shows that ABC BANK never bore the burden of the tax that is imposed by the ROTA. Retailers' occupation tax is imposed upon persons engaged in the occupation of selling tangible personal property, at retail, to purchasers for use or consumption in Illinois. 35 ILCS 120/2; Kean v. Wal-Mart Stores, Inc., 235 Ill. 2d 351, 362, 919 N.E.2d 926, 932 (2009). ABC BANK is not a retailer, and has never claimed that it is a retailer. *See Stip.* ¶ 2. Rather than engaging in the occupation that is taxed by the ROTA, ABC BANK engaged in the occupation of extending credit to persons who then purchased property at retail for use in Illinois, using the credit that ABC BANK agreed to extend to each such purchaser. *Stip.* ¶ 2 (ABC BANK "provided sales finance programs to numerous retailers in ... Illinois." and "entered into agreements ("the Agreements") that provided that [ABC BANK] will originate or acquire consumer charge accounts and receivables from such retailers on a non-recourse basis.")). Since the ROTA does not apply to ABC BANK, ABC BANK is not within the class of persons to whom the legislature intended to provide the special remedy authorized by ROTA § 6. 35 ILCS 120/6; Peoples Store of Roseland, 379 Ill. at 152, 39 N.E.2d at 998.

Further, and as a natural result of ABC BANK not being engaged in the occupation that is taxed pursuant to the ROTA, ABC BANK never remitted any amounts of tax that is imposed by the ROTA to the Department. *Stip.* ¶ 3 ("The retailers then remitted the [ROT] to the State for each transaction.")). That explains why ABC BANK

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<sup>1</sup> Section 3-45 of the UTA provides, in part:

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If a seller collects use tax measured by receipts that are not subject to use tax, or if a seller, in collecting use tax measured by receipts that are subject to tax under this Act, collects more from the purchaser than the required amount of the use tax on the transaction, the purchaser shall have a legal right to claim a refund of that amount from the seller. If, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department.



either left most of the lines in Step 4, Column A, of its Claim forms blank, or entered “0” on such lines. Stip. Ex. A, pp. 2-4. Since it was not a retailer, it did not file any original returns to report the gross receipts it realized from selling property at retail. *See* Stip. ¶¶ 2-3; Stip. Ex. A, pp. 2, 4. As the stipulations in this matter reflect, the actual Retailers from whom ABC BANK’s cardholders purchased property are the persons that collected use tax, plus the selling price for such property, from the purchasers. *See* Stip. ¶¶ 2-3. Then each Retailer remitted *its* respective, and corresponding, amount of ROT liability to the Department. Stip. ¶ 3. ABC BANK extended credit to persons who used that credit to purchase goods at retail, but that does not make ABC BANK a Retailer. Since ABC BANK never remitted any ROT to the Department, it cannot have paid any such tax in error. ABC BANK, therefore, is not entitled to any refund expressly authorized by ROTA § 6. 35 ILCS 120/6; Peoples Store of Roseland, 379 Ill. at 152, 39 N.E.2d at 998.

I move now to whether ABC BANK is entitled to a refund under the plain text of ROTR § 130.1960(d). Although ABC BANK argues that it satisfies all the requirements of the regulation (Taxpayer’s Brief, p. 6), it fails to meet the most important requirement — that the person claiming the refund be the retailer who remitted ROT in the first place. 86 Ill. Admin. Code § 130.1960(d)(2). Specifically, ROTR § 130.1960(d)(2) expressly provides that “Retailers who incur bad debt on any tangible personal property that is not repossessed may also obtain bad debt credit as provided in subsections (d)(1) and (3).” *Id.* While the parties stipulate that ABC BANK incurred bad debts because some credit card holders did not pay all they owed to ABC BANK regarding their respective Accounts (Stip. ¶¶ 4-6), ABC BANK is not a retailer. Stip. ¶¶ 2-3. Because ABC BANK is not a retailer, it is not entitled to a credit “as provided in subsections (d)(1) and (3)” of ROTR § 130.1960(d). 86 Ill. Admin. Code § 130.1960(d)(2).

ABC BANK also asserts that it is “entitled to a refund under the Bad Debt Regulation, because it is the assignee of the rights of the [R]etailers who made the sales to seek refunds under the Bad Debt Regulation.” Taxpayer’s Brief, p. 6. ABC BANK

argues that such Retailers “would have been entitled to a refund or deduction under the Bad Debt Regulation if they had not assigned their rights to [ABC BANK]. *Id.*, pp. 6-7. But all of the Retailers here collected use tax from the purchasers who obtained credit from ABC BANK. *See* Stip. ¶¶ 2-3. As a matter of law then, the Retailers here would have been entitled to a refund only if they first unconditionally repaid to their customers the use tax they had previously collected from them. 35 ILCS 120/6 (“No credit may be allowed or refund made for any amount paid by or collected from any claimant unless it appears that the claimant has unconditionally repaid, to the purchaser, any amount collected from the purchaser and retained by the claimant with respect to the same transaction under the Use Tax Act.”); Stip. Ex. A, pp. 1, 3.

Moreover, ABC BANK’s argument that Illinois law recognizes a broad right to assign claims against the government (Taxpayer’s Brief, pp. 7-9), is misplaced. ABC BANK’s argument suggests that, but for the Retailers’ assignments to ABC BANK, the Retailers here would have been entitled to a refund of some portion of the ROT that each Retailer remitted to the State. *Id.* But whether any of the Retailers here — or any retailer, generally — has a right to a refund of ROT overpaid in error depends upon the text of ROTA § 6 and other related statutory and regulatory provisions. Under the applicable regulation, the only way the Retailers would have been entitled to a bad debt credit was if the customers’ defaults caused *the Retailers* to incur a bad debt. 86 Ill. Admin. Code § 130.1960(d). The regulation expresses two ways such a bad debt might occur.

First, the Retailers here would have been entitled to a bad debt credit had they been the ones that extended financing to their customers, and had the customers’ subsequent defaults thereby actually caused the Retailers to be unable to collect all of the selling price of the goods sold. 86 Ill. Admin. Code § 130.1960(d)(1) (“[The retailer] is entitled to a bad debt credit with respect to the original sale in which the default has occurred to the extent to which he has paid Retailers’ Occupation Tax on a portion of the price which he does not collect ....”). But the Retailers did not finance their retail sales;

ABC BANK did. Stip. ¶¶ 2-3. The Retailers, moreover, collected the selling price, plus whatever use tax was due, from the purchasers. Stip. ¶ 3.

Alternatively, the Retailers would have been entitled to a bad debt credit if the assignments to ABC BANK were “with recourse.” 86 Ill. Admin. Code § 130.1960(d)(1) (“[The retailer] is entitled to a bad debt credit with respect to the original sale in which the default has occurred to the extent to which he has paid Retailers’ Occupation Tax on a portion of the price which ... he is not permitted to retain because of being required to make a repayment thereof to a lending agency under a ‘with recourse’ agreement.”). The terms, “with recourse” and “without recourse” are terms of art in commercial law. *See, e.g., Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 155-56, 101 S.Ct. 2239, 2239-40, 68 L.Ed.2d 744 (1981) (describing the practice of dealers assigning retail installment contracts, without recourse, to Ford Motor Credit Co. (FMCC), the person that financed the dealers’ sales of motor vehicles). *Cenance* involved the question of whether motor vehicle dealers who assigned their retail installment contracts “without recourse” to FMCC, gave sufficient notice to the motor vehicle purchasers that FMCC was acting a creditor, as creditor is defined in the Truth in Lending Act. *Cenance*, 452 U.S. at 155-57, 101 S.Ct. at 2239-40, 68 L.Ed.2d 744. For purposes of this case, *Cenance* is cited because of the Court’s determination that the dealer’s assignment to FMCC without recourse “divested the dealer of any risk in the transaction.” *Id.* at 158, 101 S.Ct. at 2241, 68 L.Ed.2d 744. Just so here.

ABC BANK has stipulated that its Agreements with the Retailers were “on a non-recourse basis.” Stip. ¶ 2. Thus, after the Retailers assigned their rights under the Accounts to ABC BANK on a non-recourse basis, the Retailers no longer had any risk of incurring a bad debt from a customer’s failure to pay all of the amounts it owed to ABC BANK. *Cenance*, 452 U.S. at 158, 101 S.Ct. at 2241, 68 L.Ed.2d 744. Since no Retailer would have been “required to make a repayment ... to a lending agency under a ‘with

recourse' agreement[;]" no Retailer here would have been entitled to claim a credit pursuant to 86 Ill. Admin. Code § 130.1960(d)(1).

Finally, even if ABC BANK were, itself, one of the Retailers in the transactions for which it claims a credit, this stipulated record does not contain evidence which shows that it is entitled to a credit or refund in the amount claimed. That is because ABC BANK has wholly failed to submit the detailed information required to be included on a Claim form. Stip. Ex. A; 35 ILCS 120/6a. The Claim forms that ABC BANK filed with the Department require the retailer to report detailed financial information to show that a credit is due, and in the amount claimed. Stip. Ex. A. The Claim form is divided into five numbered steps, and each requires the retailer to provide different information. *See id.* Step 1 asks the claimant to "Identify your business[;]" Step 2 asks the claimant to "Mark the reason why you are filing an amended return[;]" Step 3 asks the claimant to "Mark the reason why you overpaid your return[;]" Step 4 requires the claimant to "Correct your financial information[;]" and Step 5 requires the claimant to sign the return, under the following statement: "Under the penalties of perjury, I state that I have examined this claim and, to the best of my knowledge, it is true, correct and complete. Under penalties of perjury, I state that I have unconditionally refunded to my customer(s) any overpaid sales tax that I collected from my customer(s) and am claiming as an overpayment on this return." *Id.*

The detail requested on form ST-1-X is required by the express text of ROTA § 6a. 35 ILCS 120/6a. That section provides, in pertinent part:

§ 6a. Claims for credit or refund shall be prepared and filed upon forms provided by the Department. Each claim shall state: (1) The name and principal business address of the claimant; (2) the period covered by the claim; (3) the total amount of credit or refund claimed, giving in detail the net amount of taxable receipts reported each month or other return period used by the claimant as the basis for filing returns in the period covered by the claim; (4) the total amount of tax paid for each return period; (5) receipts upon which tax liability is admitted for each return period; (6) the amount of receipts on which credit or refund is claimed for each return period; (7) the tax due for each return period as corrected; (8) the amount of credit or refund claimed for each return period; (9) reason or reasons

why the amount, for which the claim is filed, is alleged to have been paid in error; (10) a list of the evidence (documentary or otherwise) which the claimant has available to establish his compliance with Section 6 as to bearing the burden of the tax for which he seeks credit or refund; (11) payments or parts thereof (if any) included in the claim and paid by the claimant under protest; (12) sufficient information to identify any suit which involves this Act, and to which the claimant is a party, and (13) such other information as the Department may reasonably require. \*\*\*

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35 ILCS 120/6a.

The legislature's use of the word "shall" reflects that a retailer seeking a credit for ROT claimed to have been paid in error is required to specifically identify the different amounts and items of information described in ROTA § 6a. *Id.*; Emerald Casino, Inc. v. Illinois Gaming Board, 346 Ill. App. 3d 18, 21, 803 N.E.2d 914, 916 (1<sup>st</sup> Dist. 2004) ("Generally, 'shall' indicates a mandatory intent. ... However, the word's meaning is not fixed or inflexible, and courts sometimes interpret it as directory."). The legislature, in other words, has determined that the specific items of information detailed in ROTA § 6a constitutes a material part of a retailer's claim for credit. 35 ILCS 120/6a; American Airlines, Inc. v. Department of Revenue, 402 Ill. App. 3d 579, 588, 931 N.E.2d 666, 682-83 (1<sup>st</sup> Dist. 2009) ("... [ROTA] sections 6 and 6a both provide that in properly filing a refund claim, the taxpayer bears the burden of proof in establishing the exact *amount* of refund sought.") (emphasis original). By providing this detailed information, the retailer identifies the particular gross receipts regarding which it claims to have overpaid tax in error. Providing this information also allows the Department to ensure that, if a refund is warranted, it would be no greater than the amount of tax the retailer can document that it actually overpaid. American Airlines, Inc., 402 Ill. App. 3d at 588, 931 N.E.2d at 682-83.

Notwithstanding the statutory requirement to provide specific information regarding all claims for refund, on the Claim forms ABC BANK filed for an entire 2 year period, it failed to provide information that identifies the transactions for which it claims to have paid tax in error. Stip. Ex. A, pp. 1-4. Step 3 of form ST-1-X asks the retailer/filer to "[m]ark the reason(s) why you have overpaid your return[.]" and sets forth several

different factual bases, to allow the filer to explain why it is claiming that it previously overpaid ROT in error. On Step 3 of ABC BANK's Claim forms, ABC BANK marked that it was "... increasing Line 2 [of Step 4] because I sold merchandise[.]" but it failed to mark any of the required bases to explain why it increased Line 2 on the following page. Stip. Ex. A, pp. 1, 3. Then, in Step 4 of its Claim forms, ABC BANK was required to provide sufficient financial information to substantiate its claim that it had previously overpaid a specific amount of tax in error. Stip. Ex. A, pp. 2, 4. While it entered numbers on certain lines of Step 4, it provided no documentary evidence at all to support such entries. *See Bohannon v. Commissioner*, T.C. Memo. 1997-153 (March 26, 1997) ("A tax return does not establish the correctness of the facts stated in it.") (*ABC BANKng Seaboard Commercial Corp. v. Commissioner*, 28 T.C. 1034, 1051 (1957)).

Logically, the absence of any detailed, financial information on ABC BANK's Claim forms makes perfect sense, given the stipulated facts; ABC BANK is not a retailer, and did not file original ST-1 forms during the claim periods. Stip. ¶¶ 2-3; Stip. Ex. A, pp. 2, 4. While ABC BANK may know perfectly well the amount of gross receipts it realized from extending credit during 2008 and 2009, none of those receipts was derived from selling tangible personal property at retail. Stip. ¶¶ 2-3; Stip. Ex. A, pp. 2, 4.

Further, even if I agreed that ABC BANK stood in the shoes of whatever Retailers might have filed original returns to report the gross receipts from sales to ABC BANK's credit customers, nothing on ABC BANK's Claim forms show which Retailers filed original ST-1 returns, what entries were made on such returns, or where those Retailers were doing business in Illinois. *See* Stip. Ex. A, pp. 2, 4. Certainly, no evidence or argument was offered to explain why, when the Illinois ROT rate is 6.25%, ABC BANK is asking for a refund in the amount of 8% of its reported increased deductions. Stip. Ex. A, pp. 2, 4 (lines 3, 27); 35 ILCS 120/2-10. On this point, I acknowledge that certain retailers are required to pay municipal retailers' occupation taxes (MROT) and/or municipal use taxes (MUT), based on the physical location where the retailer is

conducting business. *E.g. Chemed Corp., Inc. v. Illinois Department of Revenue*, 186 Ill. App. 3d 402, 542 N.E.2d 492 (4<sup>th</sup> Dist. 1989). These retailers are, therefore, required to remit to the State more than 6.25% in tax regarding their retail sales. *Id.* But nothing in ABC BANK's Claim forms shows that all of the Retailers that ABC BANK had Agreements with were physically located in jurisdictions that levied the identical amount of MROT/MUT. *See* Stip. Ex. A, *passim*.

In this contested case, ABC BANK bears the burden to show, with documentary evidence closely identified with its books and records, that it was entitled to the refund sought. *American Airlines, Inc.*, 402 Ill. App. 3d at 588, 931 N.E.2d at 682-83. That burden extends not just to the type of evidence which shows that ABC BANK was, in fact, the retailer that paid ROT in error to the Department, but it also extends to ABC BANK's burden to show that it is entitled to a refund in the amount claimed. *Id.*

The Department denied ABC BANK's Claim (Stip. Ex. B), and that Denial is presumptively correct. 35 ILCS 120/6b. The way to rebut the Department's prima facie case is to actually offer into evidence the books and records necessary to show that the Department's Denial was in error. *PPG Industries, Inc.*, 328 Ill. App. 3d at 33, 765 N.E.2d at 48. ABC BANK did not do so here.

In summary, ABC BANK was not engaged in the occupation of selling tangible personal property at retail. Stip. ¶ 2; 35 ILCS 120/2. ABC BANK did not bear the burden of the tax that is imposed by the ROTA, and it never remitted any ROT to the Department. Stip. ¶¶ 2-3; 35 ILCS 120/2. Since it never remitted any ROT to the Department, it could not have paid any such tax in error, and it is not entitled to a credit under either ROTA § 6 or ROTR § 130.1960(d). Stip. ¶¶ 2-3; 35 ILCS 120/6; 86 Ill. Admin. Code § 130.1960(d). Further, and regardless whether the Retailers assigned their rights under the Agreements to ABC BANK (Stip. ¶ 2), the facts here show that no Retailer would have been entitled to obtain a refund authorized by ROTR § 130.1960(d). That is because the Retailers had shifted their burden for ROT by collecting a

complementary amount of use tax from the customers to whom it extended credit, and because the Retailers' Agreements with ABC BANK were "on a non-recourse basis." Stip. ¶¶ 2-3; Stip. Ex. A, pp. 1-4 (Steps 3, 5); 35 ILCS 120/6. Finally, ABC BANK wholly failed to offer support for its claim that it is entitled to a refund in the amount claimed. *See* Stip. Ex. A.

**Conclusion:**

I recommend that the Director finalize the Department's Denial as issued.

December 11, 2012

John E. White  
Administrative Law Judge